United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

77-4057

In the
UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	
Petitioner,	)	Case No. 77-4057
v.	)	and Consolidated Case Nos. 77-4067, 77-4068, 77-4073, 77-4074, and 77-4075
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,	)	
Respondents.	)	

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P/S

PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER
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PRELIMINARY STATEMENT

Petitioner seeks review of a Report and Order of the Federal Communications Commission adopted on July 1, 1976, and reported at 60 F.C.C. 2d 261 (1976), and a Memorandum Opinion and Order Upon Reconsideration adopted January 5, 1977, and reported at 39 R.R. 2d 765 (1977).

ISSUES PRESENTED*

1. Did the Federal Communications Commission redefine common carriage in contravention of the Communications Act of 1934 and its own regulations.

2. Whether entities engaging in or providing sharing arrangements are common carriers under Section 153 (h) of the Communications Act, 47 U.S.C. § 153 (h), and Part 21.2 of the Federal Communications Commission's own regulations, 47 C.F.R. § 21.2 (1976).

3. Whether the Federal Communications Commission has arbitrarily and unlawfully authorized the very discrimination precluded under Title II of the Communications Act for a communications common carrier by its refusal to regulate entities engaging in or providing sharing arrangements of private line facilities as common carriers.

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*This case has not previously been before this Court.

REFERENCES TO PARTIES AND RULINGS

A Report and Order and a Memorandum Opinion and Order Upon Reconsideration of the Federal Communications Commission are here under review. The Report and Order (J.A. p. 28) was adopted on July 1, 1976, and is reported at 60 F.C.C.2d 261 (1976). The Memorandum Opinion and Order Upon Reconsideration (J.A. p.152) was adopted on January 5, 1977, and is reported at 39 R.R. 2d 765 (1977).

The twenty-five (25) affiliated telephone operating companies in the United Telephone System (hereinafter "United") on whose behalf this brief is filed are common carriers as defined in Section 153 (h) of the Communications Act of 1934. 47 U.S.C. § 153 (h). Six of these common carriers [1] are fully subject to the jurisdiction of the Federal Communications Commission under Title II of that Act. 47 U.S.C. §§ 201 et. seq. The remaining nineteen (19) carriers are "connecting carriers" [2] as described in Section 152 (b) (2) of the Act. 47 U.S.C.§ 152 (b) (2). These latter

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[1] Concurring Carriers: United Telephone Company of Ohio, California-Oregon Telephone Company, United Inter-Mountain Telephone Company, United Telephone Company of Indiana, United Telephone Company of the Northwest, and United Telephone Company of the West.

[2] Connecting Carriers: Carolina Telephone and Telegraph Company, United Telephone Company of Missouri, United Telephone Company of Kansas, United Telephone Company of Minnesota, United Telephone Company of Iowa, Capital City Telephone Company, Midstate Telephone Company, United Telephone Company of Arkansas, United Telephone Company of Pennsylvania, New Jersey Telephone Company, United Telephone Company of New Jersey, West Jersey Telephone Company, Blacktown Telephone Company, United Telephone Company of the Carolinas, United Telephone Company of Florida, Florida Telephone Corporation, United Telephone Company of Michigan, Gulf States-United Telephone Company, and Palo Pinto Telephone Company.

carriers are subject only to Sections 201 through 205 of the Act. 47 U.S.C. §§ 201 - 205. Pursuant to the Communications Act and various regulations promulgated thereunder, telephone operating companies are required to file tariffs with the Federal Communications Commission for the provision of interstate communications services, such as Message Toll Telephone Service (MTS) and Private Line Service (PLS). Since the United Companies connect with Bell System Companies for the provision of the above interstate services, AT&T Long Lines Department files the appropriate tariffs with the Federal Communications Commission, and the United Companies either concur in or are listed as "connecting carriers" in such AT&T tariffs. Thus, as to these services,the United Companies and the Bell Companies are partners in the provision of joint, through interstate communications.

STATEMENT OF THE CASE

Nature of the Case

This is a proceeding to review a Report and Order adopted by the Federal Communications Commission (hereinafter "FCC") on July 1, 1976, and a Memorandum Opinion and Order Upon Reconsideration adopted on January 5, 1977 (hereinafter referred to as "Orders"). These Orders prescribed unlimited resale and unlimited shared use of domestic common

carriers private line services as being just and reasonable and required that revised tariffs be filed by or on behalf of all domestic common carriers, including the United Companies, to eliminate existing restrictions on the resale and shared use of private line communications services. Insofar as these Orders are concerned, United only takes issue with that portion relating to sharing and sharing arrangements.

Proceedings Below and Related Facts

By Notice of Inquiry and Proposed Rulemaking adopted on June 26, 1974, the FCC provided for three rounds of submissions as to whether and under what conditions subscribers of the various service offerings of communications common carriers should be allowed to resale such services to others or to participate with others in the sharing or joint use of such services and, if so, whether and to what extent the Commission should regulate any such resale or shared use. 47 F.C.C. 2d 644 (1974) (J.A.p. 12). Accordingly, parties wishing to comment were requested to address twelve items so as to provide the Commission with information to establish policies with regard to resale and shared use of common carrier facilities and services and to enable it to take action necessary to effectuate such policies. Id. at 656 - 658 (J.A. pp. 24 - 26).

Upon completion of the three rounds of submissions, the Commission indicated it would issue a First Report and Order and designate therein issues to be investigated in oral hearings, if and to the extent such procedures appeared necessary or appropriate. Id. at 659 (J.A. p. 27).

In its initial submission of Comments United stressed that "resale," "sharing," and joint use" must be clearly defined before it could discuss those terms within the context of the inquiry. For the purpose of the inquiry, then, United defined "resale" as:

> the purchase of communication services, or the lease of facilities from a communications common carrier by a person and the subsequent sale of such services or the subletting of such facilities to other persons. (J.A. p. 302).

As to "sharing" or "joint use," United defined such as:

> the cooperative use of a communication service by more than one person and where the costs of such service are allocated, on some basis, to the persons using such service. (J.A. p. 302).

In brief, the basic position of United with respect to resale was that any entity engaged in the resale of communications services or the subletting of communications facilities was a common carrier and must obtain from the FCC appropriate authority pursuant to Section 214 of the Act, 47 U.S.C. § 214.(J.A. p.302). Insofar as sharing was concerned,

United contended that sharing was a tariff classification and nothing more; that as a tariff classification it was subject to the prohibitions against unjust and unreasonable discrimination as provided in Section 202 (a) of the Communications Act, 47 U.S.C. § 202 (a); and that the removal of all restrictions on sharing presented a serious legal question under the discrimination provisions of Section 202 (a) of the Act. (J.A. p. 302).

In its Reply Comments United stressed that the elimination of all tariff restrictions on sharing would result in sharing being nothing more than a subterfuge for resale. Absent some form of restriction on sharing, then, entities would be permitted to engage in a resale activity as a common carrier, but without being subject to the required FCC regulatory controls. Thus, to maintain the necessary distinction between resale and sharing, United recommended that the Commission should at least require that each person have a bona fide communications need of his own as well as pay no more then the allocated cost of his service. (J.A. pp. 1224 - 1225).

On July 1, 1976, the FCC adopted the Report and Order here under review. 60 F.C.C. 2d 261 (1976) (J.A. p. 28). Therein the FCC determined that unlimited resale and unlimited sharing of all common carrier

communications services other than monopoly services was just and reasonable and that tariff provisions which prevented or restricted such practices were unjust and unreasonable and therefore unlawful. Moreover, the Commission prescribed unlimited sharing and resale of common carriers private line services and facilities as being just and reasonable. Id. at 321 - 322. (J.A. p. 109). Accordingly, common carriers were not allowed to have in their tariffs restrictions or limitations on subscriber sharing or resale of private line services. Such had to be "unlimited." The Commission's Order provided that parties engaged in resale were to be regulated as common carriers and thus provide service indifferently to all members of the public. On the other hand, the Commission did not order nor require that intermediaries, entities, or persons engaging in sharing arrangements [3/] allow all desiring to share to do so. Finally, in its Report and Order, the Commission ordered

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[3/] Three forms of sharing arrangements were anticipated by the Commission:

(a) sharing through a non-profit intermediary;

(b) "pure" sharing wherein two or more users combine their needs to share only the costs of communications line service; and

(c) sharing, either through a for-profit intermediary or in an arrangement wherein one user is the primary user, in which line costs and charges associated with "augmented" services are shared according to usage. 60 F.C.C. 2d 261, 321 (1977) (J.A.p. 108).

The term "intermediary" was not initially defined by the Commission. In its Memorandum Opinion and Order Upon Reconsideration such was defined as "...the entity directly responsible to the carrier for payment of the entire tariff charge associated with the service or facility." 39 R.R. 2d 765, 780 (1977) (J.A.p. 168).

all common carriers subject to its jurisdiction to file revised tariffs by September 1, 1976,[4/] designed to eliminate current restrictions on the resale and shared use of their services. Id. at 322 (J.A.p. 109).

In its Petition for Reconsideration, United pointed out that in determining whether common carrier status would attach to unlimited sharers or resellers that the Commission's touchstone was whether or not a profit was involved. (J.A.p. 1440). This was despite the fact, United submitted, that the activities of unlimited sharers and resellers were the same absent profit. Thus it was United's position that the presence or absence of profit was not the test of common carrier status and that the Commission's criterion of profit as so determining was legally incorrect and contrary to both the Communications Act and existing case law. (J.A. p. 1441). Lastly, it was the position of United that the Commission had, by creating a fiction that no common carrier status attached to unlimited sharers unless a profit were involved, authorized the very discrimination which it had held that common carriers may not engage. (J.A. p. 1442).

[4/] This date was ultimately extended to March 23, 1977.

In its Memorandum Opinion and Order Upon Reconsideration [5/] the Commission stated without comment or explanation that it disagreed with United's view that the activities of sharers and resellers were the same absent profit. 39 R.R. 2d 765, 780 (1977) (J.A.p. 169). With respect to United's position that the presence or absence of profit was not the test for common carrier status, the Commission merely responded that its jurisdictional position was not based solely on profit. Further, the Commission held that it had previously used profit as a criterion upon which its jurisdiction was determined; i.e., Industrial Radiolocation Service, 5 F.C.C.2d 197 (1966). Ibid. (J.A. p. 169). It also concluded that while it recognized a basic jurisdictional criterion of common carrier status to be whether there had been an "indiscriminate offering" to the public, its disallowance of the profit motive in sharing arrangements would discourage those engaged in sharing arrangements from making such an "indiscriminate offering" of communications services to the public. Ibid. (J.A. p. 169). Nevertheless, the Commission in no way made any other criteria applicable to those persons or entities engaged in sharing arrangements other than the criterion of profit.

[5/] On reconsideration the FCC modified its prior Report and Order in two respects; it limited the applicability of its prescription to domestic common carriers and removed its requirement that a monopoly carrier providing a resale service do so through a separate corporation. 39 R.R. 2d 765, 782 (1977) (J.A.p. 172).

SUMMARY OF ARGUMENT

In its Orders the FCC has added another test to the definition of common carrier found in Section 153 (h) of the Act, 47 U.S.C. § 153 (h), so as to include those entities which make a profit from the resale of private line communications services (resellers) and narrowed the definition so as to exclude those entities which do not make a profit from the provision of these services (those engaging in sharing arrangements). Under the Communications Act one who carries communications for others is either a common carrier or one is not. In determining the existence or non-existence of common carriage, the FCC is required to adhere to the statutory definition of common carrier found in Section 153 (h) of the Act and existing case law. It may not, as it did in its Orders, circumvent the Act to enable it to achieve certain regulatory goals; i.e., the envisioned public benefits from sharing arrangements.

Consequently, in determining whether common carrier status should attach to resellers or persons or entities engaged in sharing arrangements, the Commission was required to assess the following; namely, an undertaking to carry for hire all people indifferently and that the system be such that customers transmit intelligence of their own design and choosing. NARUC v. FCC, 525 F2d 630 (D.C. Cir. 1976); NARUC v. FCC, 533 F2d 601, 608 - 609 (D.C. Cir. 1976).

The Commission, however, refused to apply such criteria and, instead, rested its determination for common carrier status on whether or not resellers or persons or entities engaging in or providing sharing arrangements would or could make a profit from their activities. Such application of profit as being the test for common carriage constitutes an impermissible re-definition of common carriage and conflicts with the Communications Act, the Commission's own regulations, and existing case law. Regardless of the public benefits it envisioned from sharing arrangements, the Commission was not at liberty to amend the Communications Act so as to enable it to accomplish those objectives.

A common carrier is such by virtue of his occupation -- not by virtue of legislative fiat or his charter. Examination of the sharing arrangements as authorized by the FCC reveals that the requisite criteria for common carriage were, in fact, met. Those engaging in sharing arrangements are able to transmit intelligence of their own design and choosing; the service is for hire; and entities engaging in sharing arrangements are free to solicit business indifferently from the public. Accordingly, for the Commission to refuse to regulate entities engaging in sharing arrangements as common carriers on the basis that such activity did not meet the requisite criteria was legal error.

Moreover, by engaging in the fiction that no common carrier status attaches unless a profit is involved, the Commission has authorized the very discrimination which it held communications common carriers may not lawfully engage. Thus, those engaging in sharing arrangements may exclude others from the arrangement for whatever reason or whim they may possess, and the Commission may not interfere for it has refused to assert jurisdiction or assume any controls over what, in reality, is a common carrier activity; i.e., entities engaging in sharing arrangements. The net effect of this is that the Commission has substituted one form of discrimination over which it has relinquished control (entities engaging in sharing arrangements) -- for another -- carrier tariff restrictions on sharing.

ARGUMENT

I. The FCC is not empowered to redefine what is a common carrier under the Communications Act of 1934.

The determination of whether an entity is a common carrier under Title II of the Communications Act must be made by application of Section 153 (h) of the Communications Act, the Commission's own regulations, and the existing case law. Section 153 (h) of the Communications Act defines a "common carrier" as:

> ...any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy.... 47 U.S.C.§ 153 (h).

The Commission's own regulations are slightly more illuminating and define such activity as "...any person engaged in rendering communication service for hire to the public." 47 C.F.R. § 21.2 (1976).

The term for "hire" appears in both the Act and the Commission's own regulations and contemplates that the person providing the communication service do so for compensation or remuneration rather than gratuitously. Insofar as the term "public" is concerned, it has been held sufficiently indefinite so as to revert to the common law of carriers for construction. NARUC v. FCC, 525 F2d 630 (D.C. Cir. 1976). Thus, in determining whether an entity is a common carrier under the Act, the critical factor has been held to be "the quasi-public character of the activity involved;" i.e., the undertaking to carry for all people indifferently. Id. at 641.

In its Orders here under review, the FCC defined "resale" of common carriers services as:

> ...the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public (with or without "adding value") for profit.

"Sharing" was defined as:

> ...a non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying the communications related costs associated therewith according to its pro rata usage of the communications services and facilities. 60 F.C.C. 2d 261, 263 (1976) (J.A.p. 31). (Emphasis added.)

In the case of resellers, the Commission held that it would regulate them as common carriers, but it would not so regulate entities engaging in sharing arrangements. The key to its decision not to regulate entities engaging in sharing arrangements as common carriers stemmed from its belief that "...sharing does not constitute the offering of a service by one entity to others for a profit." Id. at 265 (J.A.p. 33). (Emphasis added.)

The only difference, then, between entities engaging in sharing arrangements and resellers was that resellers were expected to make a profit and, hence, be regulated as common carriers and sharers were not to make a profit and thereby avoid regulation. Id. at 263 (J.A.p. 31). This application of "profit" as being the test for common carriage constitutes an impermissible re-definition of common carriage and conflicts with the Communications Act, the Commission's own regulations, and the existing case law. The Act and the Commission's regulations on common

carriage do not equate "for hire" with "profit" as the Commission did in its Orders. See, 47 U.S.C. § 153 (h) and 47 C.F.R. § 21.2 (1976). More importantly, the presence or absence of profit has been held not to be the test for common carrier status. NARUC v. FCC, supra at 641; NARUC v. FCC, 533 F2d 601 (D.C.Cir. 1976). Instead, the test is a two-fold one; namely, an undertaking to carry for hire all people indifferently and that the system be such that customers transmit intelligence of their own design and choosing. NARUC v. FCC, 525 F2d 630 (D.C. Cir. 1976); NARUC v. FCC, 533 F2d 601, 608 - 609 (D.C.Cir. 1976); Industrial Radiolocation Service, 5 F.C.C.2d 197, 202 (1966). Moreover, holding out to provide service to a significant number of the members of the public rather than only to one is sufficient to constitute common carriage.

In determining whether or not entities engaging in sharing arrangements were common carriers, the Commission was required to adhere to the existing statutory definition of common carrier as set forth in Section 153 (n) of the Act and the existing case law. This, however, it failed to do and, instead, changed the statutory definition of common carrier so as to include only those who make a profit from providing communications services (resellers) and to exclude those entities who do not (those engaged in sharing arrangements). Nevertheless, its failure to enforce the law does not change

it. Louisville & N.R.R. v. United States, 282 U.S. 740, 759 (1931). As the Court said in Contract Steel Carriers v. United States:

> Dissatisfaction of an enforcement agency with the provision of a statute does not open the legislative act to amendment by administrative decision under the guise of interpretation. If the Commission felt that amendment was necessary or desirable, the plea should have been addressed to Congress. Contract Steel Carriers v. United States, 128 F Supp. 25, 31 (N.D.Ind. 1955), aff'd., 350 U.S. 409 (1956).

II. Entities engaging in or providing sharing arrangements are common carriers.

The FCC's holding that entities engaging in sharing arrangements were not engaged in common carriage constitutes legal error. The distinctive feature or characteristic of a common carrier is that he undertakes to carry for all people indifferently. Semon v. Royal Indemnity Co., 279 F2d 737, 739 (5th Cir. 1960); Home Insurance Co. v. Riddell, 252 F2d 1, 4 (5th Cir. 1958). However, the carrier's services do not have to be available to the entire public -- indeed, it maybe that his service is specialized and only of use to a fraction of the population. Also, the carrier may turn business away either because it is not the type normally accepted or because the carrier's capacity has been exhausted. Propeller Niagara v. Cordes, 62 U.S. 41, 46 (1858); NARUC v. FCC, 525 F2d 630, 641 (D.C. Cir. 1976). Another characteristic of common carriage in terms of the Communications Act

is that the system be such that customers transmit intelligence of their own design and choosing. NARUC v. FCC, 533 F2d 601, 609 (D.C. Cir. 1976); Industrial Radiolocation Service, 5 F.C.C. 177, 202 (1966); Frontier Broadcasting Co. v. J.E. Collier, 24 F.C.C. 251, 254 (1958). Lastly, the carrier's service must be "for hire," 47 U.S.C. § 153 (h); Industrial Radiolocation Service, supra. The criterion then for determining whether or not an entity is a common carrier is established by an affirmative answer to the above principles.

The FCC's refusal in its Orders to assert common carrier jurisdiction over those entities engaging in sharing arrangements, however, does not rest on application of these three principles. Instead, it rests on the finding that :

> Because sharing does not constitute the offering of a service by one entity to others for a profit...entities engaged in sharing arrangements are not subject to regulation under Title II of the Act. 60 F.C.C. 2d 261, 265 (J.A. p. 33). (Emphasis added.)

The Commission stated that it did not forever foreclose assertion of common carrier jurisdiction over entities engaging in sharing arrangements. Instead, it adopted a wait-and-see approach; that is to say, if entities engaging in sharing arrangements sought to make a profit, the Commission then, and only then, would "...look to the substantial likelihood of an

indiscriminate offering to the public...." Id. at 317 (J.A.p. 102). In this regard, United submits that the Commission applied an erroneous test for common carri[illegible]s. First of all, the Commission equated "for hire" with "for p[illegible]n the contravention of the Act. 47 U.S.C.§ 153 (h). "For profit" is not the statutory equivalent of "for hire." Existing case law is replete with the requirement that the service be "for hire." Propeller Niagara v. Cordes, 62 U.S. 41, 46 (1858); Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 207 (1927); Home Insurance Co. v. Riddell, 252 F2d 1 (5th Cir. 1958). Moreover, the Industrial Radiolocation Service case upon which the Commission relies as establishing profit as a jurisdictional criterion, 39 R.R. 2d 765, 780 (1977), (J.A. p. 169), does not so hold. It says, instead:

> ...the fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio.... 5 F.C.C.2d 197, 202 (1966). (Emphasis added.)

Secondly, the test for common carrier status is not to first ascertain whether an entity engaging in a sharing arrangement is making a profit and thereafter ascertain if the entity is undertaking to carry for all people indifferently. Suffice it to say, if profit were the threshold test for common carriage, many existing common carriers could be relieved of their status.

A common carrier is such by virtue of his occupation -- not because of legislative fiat, his charter, or because his state of incorporation considers him such. Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 211 - 212 (1927); United States v. Brooklyn Eastern Dist. Terminal, 249 U.S. 296, 304 (1919). Therefore, as long as there is a public holding out to carry for hire, an entity is a common carrier regardless of its intention to become one. A common carrier need not undertake to carry indifferently all goods, but he may specialize in only one or one class of goods. He can also confine his holding out to but a segment or class of the public without losing his common carrier status so long as his practice is to serve indifferently any member of the segment or class. NARUC v. FCC, 525 F2d 630, 641 (D.C. Cir. 1976).

The underlying assumption in both Commission Orders with respect to entities engaging in sharing arrangements is that if profit is absent from sharing arrangements, there will be no holding out to the public; i.e., no common carriage. 60 F.C.C. 2d 261, 316 - 317, 319 - 320 (1976), 39 R.R. 2d 765, 780 - 781 (1977) (J.A.pp. 102 - 103, 105 - 107, 168 - 170). It does not follow, however, from what the Commission has held that there will be no holding out to the public by entities engaging in sharing arrangements absent profit. Indeed, the Commission appeared cognizant

that such would be the case. For example, despite the fact that in both Orders it characterized sharing in terms of long-term arrangements as opposed to short-term ones, it steadfastly refused to set a minimum time requirement that entities engaging in sharing arrangements must meet. 60 F.C.C.2d 261, 319 (1976); 39 R.R.2d 765, 780 (1977) (J.A. pp. 106, 168 - 169). Nor did the Commission require that entities engaging in sharing arrangements file reports with it, limit their advertising or enter into contracts as was required in its holdings with regard to SMRS under review in NARUC v. FCC, 525 F2d 630 (D.C.Cir. 1976). 60 F.C.C.2d 261, 319 - 321 (1976) (J.A.pp. 104 - 108). Additionally, in response to various submissions in Docket No. 20097 that it at least require some minimal reporting from those engaging in sharing arrangements if it authorized such, the Commission said:

> Although such reporting requirements may assist in the supervision of unlawful resale in the form of sharing, we are not convinced that this possible benefit outweighs the disadvantages. 60 F.C.C. 2d 261, 320 (1976) (J.A.p. 107).

Continuing, it held:

> We realize that it might be thought preferable to adopt a set of regulations which strictly delineated resale and sharing, but this may not be a realistic approach in view of the difficulty in maintaining a clear distinction between these activities. Id. at 321 (J.A.p. 108). (Emphasis added.)

In essence, despite its protests to the contrary, the Commission applied one test, and one test only, to determine whether entities engaging in sharing arrangements are providing common carriage to-wit, whether a profit was involved. Id. at 316 - 317, 319 (1976); 39 R.R. 2d 765, 780 (1977) (J.A.pp. 102-103, 105-106, 168-169). Under the Act one is either a common carrier or one is not -- there is not any middle ground as there is, for example, under the Motor Carrier Act which recognizes common, private, and contract carriers. 49 U.S.C. § 303 (14), (15), (17). Therefore, if one is engaging in communications carriage for anyone other than oneself, such is either private carriage or common carriage. While carriage for one may be private, carriage of any significant number beyond one hardly ever can be private. However, this does not mean that if one holds out to serve all,and despite this,only serves one customer that no common carriage is involved. Nor can what is common carriage be changed into private carriage by a refusal to serve. Semon v. Royal Indemnity Company. 279 F2d 737, 740 (5th Cir. 1960). So long as there is a holding out to provide communications service for hire to the public, one is a common carrier.

In determining whether entities engaging in sharing arrangements were common carriers, the Commission had no discretion to confer or not to confer

common carrier status depending upon the regulatory goals it sought to achieve. NARUC v. FCC, 525 F2d 630, 644 (D.C.Cir. 1976).

What it was required to do was to determine if there were an undertaking to carry for hire all people indifferently and if the system were such that customers could transmit intelligence of their own design and choosing. NARUC v. FCC, 525 F2d 630 (D.C.Cir. 1976); NARUC v. FCC, 533 F2d 601 (D.C. Cir. 1976); Industrial Radiolocation Service, 5 F.C.C. 2d 197 (1966).

Applying this criteria to entities engaging in sharing arrangements, it is apparent that such constituted common carriage. Entities engaging in sharing arrangements are able to transmit intelligence of their own design and choosing; the service is for hire; and entities engaging in sharing arrangements are free to solicit business indifferently from the public.

In brief, entities permitted to engage in sharing arrangements and resellers are both the same absent profit. 60 F.C.C. 2d 261, 265-266; 271 - 276, 298, 303, 316 - 321 (1976) (J.A. pp. 33 - 35, 41 - 49, 77- 78, 83 - 85, 101 - 109). For the Commission therefore to refuse to regulate entities engaging in sharing arrangements as common carriers on the basis that such activity did not meet the requisite criteria was legal error.

III. The FCC may not authorize entities engaging in sharing arrangements to discriminate in violation of Sections 201 (b) and 202 (a) of the Communications Act by the fiction of calling them non-common carriers.

If one is a communications common carrier, under Title II of the Act there are attendant duties, such as the duty to file tariffs and, pursuant thereto, to provide service within one's available capacity and to charge rates for service that are just and reasonable, as well as to forego unlawful discrimination or preference in provision of like communications services. 47 U.S.C. §§ 201 - 203. In the Orders here under review the Commission struck down as being in violation of Sections 201 (b) and 202 (a) of the Act those portions of carriers' private line tariffs that precluded unlimited sharing and resale of common carrier services. 60 F.C.C. 2d 261, 283 - 284, 321 (1976); 39 R.R. 2d 765, 782 (1977) (J.A. pp. 58-60, 109). The Commission also prescribed unlimited sharing and resale of private line services as being just and reasonable and the carriers were ordered to file revised tariff provisions to remove the unlawful discrimination. 60 F.C.C. 2d 261, 322; 39 R.R. 2d 765, 782 (1977) (J.A. pp. 109, 170-172).

Insofar as the meaning of the term "unlimited sharing" in the Commission's Orders is concerned, it is important to note that it pertains only to common carriers and their tariffs. Therefore, common carriers may not in their private line tariffs have restrictions or limitations on sharing by customers. The Commission did not, however, require entities engaging in sharing arrangements to permit unlimited sharing or forego

limitations or restrictions on who may share the facilities. Thus, "unlimited sharing" versus sharing permitted by entities engaging in sharing arrangements ("limited sharing") is the same thing as "non-discrimination" versus "discrimination."

As previously discussed herein, it is United's position that the Commission erred in holding that entities engaging in sharing arrangements were not common carriers (Arguments I and II). Consequently, as a result of its failure to apply the proper test of common carriage to entities engaging in sharing arrangements -- insisting as it did on the fiction of profit as being the determining element -- the Commission authorized those entities to engage in the very discrimination which it held communications common carriers may not lawfully engage. In the instant situation it is even more serious, for while under Title II of the Act the Commission has the ability to require carriers to eliminate what it finds to be an unlawful discrimination, in its Orders it has relinquished control over entities engaging in sharing arrangements who may seek to do the same thing. In essence, it has precluded any control over entities engaging in sharing arrangements, deciding as it did not to require even minimal reporting from them, and leaving the detection of abuses -- profit making -- to common carriers. 60 F.C.C. 2d 261, 320 - 321 (1977); 39 R.R.2d 765, 780 - 781 (1977) (J.A.pp. 106-108, 168 - 170). Consequently,

pursuant to the Commission's Orders, entities engaging in sharing arrangements are free to decide who should share and who should not share rather than to treat all customers alike.

This ability to discriminate without fear of regulatory intervention is an important one insofar as entities engaging in sharing arrangements are concerned. For example, despite the fact that a common carrier is only required to serve within the limitations of his capacity, he may still be required by the appropriate regulatory body within some point in time to upgrade the capacity of his service and thereby serve additional customers. This same requirement, though, to expand their capacity or service,would not apply to entities engaging in sharing arrangements. Such entities, therefore, may refuse to accept additional customers -- i.e., to "discriminate" against them, while common carriers may not. To illustrate, assume that an entity subscribes to a private line circuit between two cities and requires the use of the circuit for only one-fourth of the time that it is available to him. So as to reduce the cost of his service, he would look for other sharers. The ideal situation would be for him to find sharers whose requirements were such that the remaining three-fourths of the capacity of the circuit was exhausted and he could divide the costs of the circuit with other users based on proportional usage. Hence, it may

be that by offering around he finds six other entities who each needs the service for one-eighth of the day,and the capacity of the circuit is thereby exhausted or filled. However, the situation may well arise that the demand from those hearing of the offer exceeds the available capacity; that is to say, seven entities rather than six wish to share the circuit. Acceptance of the seventh entity, though, would require a second circuit which would be less economic. Therefore, one entity would be denied the ability to share. Assuming, however, that the initial sharing entity were a common carrier, he (or the other sharers) would not be allowed to deny service to the one entity on the grounds that it was less economical to provide two circuits. If he did, this could constitute a violation of the Communications Act.

Moreover, pursuant to the Commission's Orders, entities engaging in sharing arrangements can refuse to share with competing entities -- regardless of the economies involved. Exclusion of other potential sharers from a sharing arrangement for whatever reason is perfectly permissible under the Commission's Orders. Sharing as ordered by the Commission is only "unlimited" then with respect to the Commission's requirement that carriers permit all of their customers to share without restrictions. As to entities engaging in sharing arrangements, the sharing, as demonstrated, may be very limited. Significantly enough, arbitrary exclusion or

discrimination was what the Commission professed to eliminate when it prescribed unlimited sharing and resale. See, for example, page 266 of the Commission's Order wherein it said:

> Thus, AT&T has itself decided who should receive such status (the ability to share or resell services) and who should not. What our decision does is simply to require AT&T to treat all of its customers alike unless valid reasons exist to the contrary. Such a requirement is mandated by the Communications Act. 60 F.C.C. 2d 261, 266 (1976) (J.A. p. 34).

Notwithstanding, under the Commission's Orders, entities engaging in sharing arrangements are free to exclude others from sharing arrangements for whatever reason or whim, and the Commission will not interfere -- indeed, may not interfere -- as it has held that absent profit entities engaging in sharing arrangements are not common carriers. Id. at 265 (J.A.p. 33). Thus, by engaging in the fiction as to the absence of profit negating the existence of common carrier status for entities engaging in sharing arrangements, the Commission has arbitrarily and capriciously substituted one form of discrimination over which it has relinquished control (entities engaging in sharing arrangements) -- for another -- carrier tariff restrictions on sharing.

CONCLUSION

On the basis of the foregoing, United respectfully submits that the Commission's Orders here under review are arbitrary, capricious,

constitute an abuse of discretion, and are otherwise unlawful. Wherefore, the Court should set aside that portion of the Commission's Orders respecting its policy not to regulate entities engaging in sharing arrangements as common carriers.

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ADDENDUM

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Specified Provisions of the Communications Act of 1934, as amended, the Motor Carrier Act, and FCC Regulations

Section 152 (b), 47 U.S.C. § 152 (b), provides:

> (b)[3] Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Section 153 (h), 47 U.S.C. § 153 (h), provides:

> (h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 201, 47 U.S.C. § 201, provides:

SEC. 201. (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government [27] and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any other provisions of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provision of this Act.[28]

Section 202, 47 U.S.C. § 202, provides:

SEC. 202. (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.[29]

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Section 203, 47 U.S.C. § 203, provides:

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Section 204, 47 U.S.C. § 204, provides:

SEC. 204. Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 205, 47 U.S.C. § 205, provides:

> SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.
>
> (b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 214, 47 U.S.C. § 214, provides:

SEC. 214. (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided* that no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this Act: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of the Army,[22] the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After

continued-Section 214, 47 U.S.C. § 214, provides:

> issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.
>
> (d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall forfeit to the United States $100 for each day during which such refusal or neglect continues.[33]

Section 303 (14), (15), (17), 49 U.S.C. § 303 (14), (15), (17), provides:

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this subsection and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Part 21.2, 47 C.F.R. § 21.2, provides:

> Communication common carrier. Any person engaged in rendering communication service for hire to the public.

CERTIFICATE OF SERVICE

I, Gloria L. King, hereby certify that the foregoing "Brief" was served this 25th day of May, 1977, by mailing true copies thereof by U. S. mail, postage prepaid, to the following persons at the addresses shown below:

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